

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SHERRY K WEST

Claimant

APPEAL NO. 13A-UI-13032-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 10/27/13

Claimant: Respondent (2)

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment
871 IAC 24.10 – Employer Participation

STATEMENT OF THE CASE:

The employer, Wal-Mart, filed an appeal from a decision dated November 14, 2013, reference 01. The decision allowed benefits to the claimant, Sherry West. After due notice was issued, a hearing was held by telephone conference call on December 17, 2013. The claimant participated on her own behalf. The employer participated by Assistant Manager Heather Ebright-Adriarte.

ISSUE:

The issue is whether was discharged for misconduct sufficient to warrant a denial of unemployment benefits, whether the claimant is overpaid unemployment insurance benefits and whether the employer's account is charged due to non-participation at the fact-finding interview.

FINDINGS OF FACT:

Sherry West was employed by Wal-Mart from November 27, 2012 until October 25, 2013 as a full-time cashier. On October 23, 2013, the claimant and another employee collided as they were rounding a corner from opposite directions. The other employee, Stephanie, smiled and said, "Sorry, babe." Three or four minutes later Ms. West went up to Stephanie and said, "if you want to fight I'll take you outside and kick your fucking ass."

Stephanie reported the incident to a supervisor who notified an assistant manager and security. The claimant admitted to making the threat because she felt the other employee had deliberately "slammed" into her.

The employer's policy is zero tolerance for any threats made in the workplace. The claimant was discharged on October 25, 2013, for violating the policy.

Sherry West has received unemployment benefits since filing a claim with an effective date of October 27, 2013. The employer did not participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The claimant was discharged for violating a known company rule regarding workplace violence. Whatever Ms. West's opinion might be as to whether the other employee deliberately "slammed" into her, issuing threats is not the appropriate way to deal with the situation. She should have reported the incident to a supervisor immediately but instead chose to threaten a co-worker first. The employer has the obligation to provide a safe and harassment-free work environment for all employees and the claimant's conduct interfered with its ability to do so. This is conduct not in the best interests of the employer and the claimant is disqualified.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

DECISION:

The unemployment insurance decision dated November 14, 2013, reference 01, is reversed. Sherry West is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. She is overpaid \$1,770.00. The claimant is not required to repay the overpayment and the employer is charged for the amount of the overpayment because the employer failed to participate in the fact-finding interview.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css